

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2015-0406
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
THOMAS C. SMITH,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case Nos. 14AP-154, 14AP-155

**MEMORANDUM OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL
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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
MEMORANDUM IN SUPPORT OF RECONSIDERATION.....	1
1. The defendants prosecuted under H.B. 64 were some of the most serious offenders, and <i>Smith</i> is only the first of many such cases that have been or will be appealed out of the Tenth District.....	1
2. The decision below creates incongruous results around Ohio, and a case recently argued in the Twelfth District may create a conflict with the Tenth District’s decisions in <i>Smith</i> , <i>Mohammad</i> , and <i>Mobarak</i>	3
3. The decision below is wrong, and the Tenth District’s subsequent decision in <i>State v. Mohammad</i> shows that it misunderstood Ohio’s laws concerning controlled substance analogs.....	4
CONCLUSION.....	5
CERTIFICATE OF SERVICE	

MEMORANDUM IN SUPPORT OF RECONSIDERATION

Under Rule 18.02(C) of the Supreme Court Rules of Practice, *amicus curiae* Ohio Attorney General Michael DeWine urges the Court to reconsider its August 26, 2015 decision declining jurisdiction in this case. This case presents issues that are of great consequence to Ohio, and this Court should resolve them.

This is only the first in a long line of cases (including a potential conflict) that this Court will see presenting the same legal issue. That issue is whether, during the fourteen months that Smith and other significant defendants were indicted for their offenses, portions of the Revised Code that criminalized the possession and sale of Schedule I controlled substances also criminalized the possession and sale of controlled substance analogs. For the following reasons, the Court should reconsider its decision and grant review.

1. The defendants prosecuted under H.B. 64 were some of the most serious offenders, and *Smith* is only the first of many such cases that have been or will be appealed out of the Tenth District.

The Court should grant review because the decision below affects a large number of significant offenders in Franklin County—not just Smith. Denying review here not only sets free one of the most significant offenders of the synthetic-drug law, but sets the stage to free several more of the kingpins of the synthetic-drug trade in Franklin County.

After the State filed its Notice of Appeal in this case, the Tenth District issued follow-on opinions in two other cases: *State v. Mohammad*, 2015-Ohio-1234 (indictment dismissed based on *Smith*) and *State v. Mobarak*, 2015-Ohio-3007 (seven-count conviction and 35-year prison sentence overturned as plain error, based on *Smith*). The State has appealed both decisions. *See Mohammad*, No. 2015-0774; *Mobarak*, No. 2015-1259. The Attorney General has filed an *amicus* memorandum supporting jurisdiction in *Mohammad* and will do so again in *Mobarak*. Furthermore, the State's appeals from the dismissal of the indictments in the consolidated cases

State v. Mustafa, Nos. 15AP-465 & 15AP-466, are currently pending in the Tenth District. They will no doubt see this Court's docket by the year's end. Back at the trial court, one defendant has moved to withdraw his guilty plea, *see State v. Hasan Mobarak*, No. 12CR-5583, while another has moved to dismiss his pending indictment, *see State v. Ahmad Mobarak*, No. 13-CR-532.

These defendants were all prosecuted under Sub. H.B. 64. *See* 2011 Ohio Laws 43. Immediately after H.B. 64 was passed, the State pursued the most significant offenders in an effort to control the escalating synthetic-drug crisis. These seven cases are the result of this undertaking. By declining review here, the Court countenances the release of all of these men, one of whom bragged about earning almost a million dollars selling controlled substance analogs to drug addicts in Franklin County. *See State v. Mobarak*, Tr. 753.

The seriousness of the crimes in these cases cannot be understated. The synthetic drugs known as "bath salts" and "spice" in street slang are uniquely harmful to individual users and to the community at large. Perhaps a drug-user witness in the *Mobarak* case explained it best:

WITNESS: Bath salts is basically like heroin -- I mean not heroin -- cocaine, meth, and ecstasy -- I don't know if you know anything about that -- all rolled into one. The only difference is you don't get the geek off of it like you do cocaine, but then with bath salts, bath salts keeps you up for days. I mean, so you got to have where you hear these instances where people saying they eat people's faces and stuff.

...

WITNESS: You got to have a strong mind when you do bath salts because you're dealing with sleep deprivation and a drug that's kind of a psychomatic [sic] drug. So like my instance, I ran from Columbus PD two times through Columbus over 100 miles per hour. There wasn't no cops behind me. I mean, one time I left his store, it was like 11:15, and I was going through Short North with no headlights on, running alleys with using my emergency brake because I thought the cops was behind me.

State v. Mobarak, Tr. 755-56. Needless to say, criminal cases concerning these substances are worth the Court's attention.

2. The decision below creates incongruous results around Ohio, and a case recently argued in the Twelfth District may create a conflict with the Tenth District's decisions in *Smith*, *Mohammad*, and *Mobarak*.

This Court should grant review because Defendants outside Franklin County were convicted of analog offenses during the relevant time period. An appeal from one such conviction has the potential to land at this Court's doorstep as a certified conflict. The Court should not enter final judgments in this case or others, only to accept a later case.

The Twelfth District recently heard argument in *State v. Shalash*, No. 2014-12-146, where it has been asked to reverse a defendant's convictions based on the Tenth District's decision in this case. Shalash was convicted "on multiple counts of aggravated trafficking of controlled substance analogs and one count of engaging in a pattern of corrupt activity, for which he was sentenced to 11 years in prison." *State v. Shalash*, 2014-Ohio-2584 ¶ 1 (12th Dist.). Although the Twelfth District initially reversed Shalash's conviction on a *Daubert* issue, *see id.*, Shalash was re-convicted and re-sentenced on remand. He has again appealed. (His appellant's brief in the second appeal, which relies heavily on *Smith*, was filed ten days after the State's appeal in this case.) One of the two issues now pending before the Twelfth District is whether it was error for the Court of Common Pleas to proceed on the indictment, based on the Tenth District's decision in this case.

This Court will undoubtedly be asked to review the Twelfth District's forthcoming decision in *Shalash*. Regardless of how that court rules, this Court should grant review now. If the Twelfth District rejects Shalash's argument, creating a conflict with the Tenth, this Court will need to resolve the split as a certified conflict. If the Twelfth District adopts the errors of the decision below, it will confirm that the question in this appeal has importance outside of Franklin County. It would be wise for the Court to grant review here, before an alleged distributor like Smith walks free.

3. The decision below is wrong, and the Tenth District’s subsequent decision in *State v. Mohammad* shows that it misunderstood Ohio’s laws concerning controlled substance analogs.

The Court should grant review because the decision below misused tools of statutory construction—the rule of lenity, in particular—to defeat the plain language of the statutory text. *See Smith*, Mem. Amicus Curiae Supp. Jur. 10-15; *Mohammad*, Mem. Amicus Curiae Supp. Jur. 8-13. This Court’s guidance is needed to reinforce two key principles. *First*, plain and unambiguous statutes must be applied as written. *See State v. Kreischer*, 109 Ohio St. 3d 391, 2006-Ohio-2706 ¶ 12 (resolving a question of statutory construction concerning a superseded statute). And *second*, the rule of lenity applies only where a statute is ambiguous, and even then it enters “at the end of the process . . . , not at the beginning as an overriding consideration of being lenient to wrongdoers.” *See State v. Stevens*, 139 Ohio St. 3d 247, 2014-Ohio-1932 ¶ 39 (Kennedy and O’Donnell, JJ., concurring in part and dissenting in part) (internal quotation marks omitted); *see also State v. Elmore*, 122 Ohio St. 3d 472, 2009-Ohio-3478 ¶¶ 40-41.

The lower court’s misguided reasoning here is shown by the Tenth District’s follow-on decision in *Mohammad*. *See* 2015-Ohio-1234. The *Mohammad* court appears to have misunderstood the relevant statutes as criminalizing the abuse of *actual* bath salts (i.e., the legal salts added to bathwater), not mind-bending drugs *called* bath salts in slang:

Bath salts which were to be used as bath salts were perfectly legal. Bath salts ‘intended for human consumption’ were illegal to possess. The statute is silent as to the issue of intended by whom. The manufacturer? The merchant selling the bath salts? The purchaser who wants to use them in bath water? A teenage member of the purchaser’s family who has heard they can be used to get high? What happens if that teenager later decides to use the bath salts in the bath water instead?

See id. ¶ 11. The court proceeded to conclude that the statutes at issue in this case were amended to correct “practical problems.” *See id.* ¶¶ 11, 12 (“Sub. H.B. 64 was unworkable and needed the subsequent clarifications which were effective in December 2012.”).

Respectfully, this is wrong. Bath salts have nothing in common with the therapeutic or fragrant crystals that are added to bath water. As the Attorney General explained in his *amicus* memorandum in *Mohammad*, “[t]he synthetic cathinone products marketed as ‘bath salts’ to evade detection by authorities should not be confused with products such as Epsom salts that are sold to improve the experience of bathing. The latter have no psychoactive (drug-like) properties.” See *Mohammad*, Mem. *Amicus Curiae* Supp. Jur. at 3, 12 (quoting Nat’l Inst. on Drug Abuse, *Drug Facts: Synthetic Cathinones (“Bath Salts”)*, <http://tinyurl.com/ct72jk4>). Bath salts are *not* one of the legitimate yet potentially intoxicative products—like highlighters or glue—found around a typical home. They are potent drugs created and manufactured for the exclusive purpose of getting high. As the Tenth District’s factual premise was mistaken, its legal understanding of the analog statutes should be reviewed.

The Tenth District’s misconception matters because the distortion of the facts led to legal error. The court’s belief that an illegal drug was actually something akin to Epsom salts appears to have validated the defendant’s arguments that the statute was confusing or plagued by “practical problems.” See *Mohammad*, 2015-Ohio-1234 ¶¶ 11-12; see also *Mohammad*, Mem. *Amicus Curiae* Supp. Jur. 11-13. More importantly, it shows that the Tenth District did not actually understand the law that it invalidated. If defendants like Smith are going to walk free on a technicality, it should at least be a well-reasoned technicality. Because it was not, this Court should reconsider its decision to decline jurisdiction over this case.

CONCLUSION

For the foregoing reasons, the Court should grant the State’s Motion for Reconsideration, accept jurisdiction over this case, and reverse.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Jurisdiction was served on September 8, 2015, by U.S. mail on the following:

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